In the Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as LA SALLE MINING COMPANY, a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED L. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

FRED M. WINNER,
Majestic Building,
Denver, Colorado,
EUGENE H. MAST,
First National Bank Bldg.,
Grand Junction, Colorado,
Attorneys for Appellants.

INDEX

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	5
Statement	6
The Questions Are Substantial	8
I. The Statute As Applied Is An Unconstitutional Tax On Federal Property Assessed Against Appellants	9
II. The Statute As Construed By The Colorado Supreme Court Discriminates Against The United States And Its Lessees	12
Conclusion	13
Appendix A:	
Opinion of Supreme Court of Colorado	1a
Judgment of Supreme Court of Colorado	4a
Petition for Rehearing	4a
Order of Supreme Court of Colorado Denying Petition for Rehearing	7a
Appendix B:	
Judgment of District Court, Montrose County	7a

CITATIONS

Cases:— Page

City of Detroit v. Murray Corp., 355 U.S. 489 . . . 8, 9, 10

Elder v. Wood, 208 U.S. 226 8

Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, at 644 8

McCulloch v. Md., 4 Wheat 316 . . . . . 8, 9, 12

Miller v. Milwaukee, 272 U.S. 713 12

Myles Salt Co. v. Bondurant, 257 U.S. 282 3

Phillips Chemical Co. v. Dumas Independent School District, . . . U.S. . . . , 4 L. Ed. 2d 384 . . . . 3, 8, 9, 12

United States v. Allegheny Co., 322 U.S. 174 9

United States v. City of Detroit, 355 U.S. 466 . . . . . 3, 8, 9, 10, 12

United States v. Township of Muskegon, 355 U.S. 484 . . . . . 8, 9

Constitutions and Statutes:

Act of August 1, 1946, 60 Stat. 765 . . . . . 2, 6

Colorado Session Laws, 1957
Chapter 267:
Page 803, Sec. 3 (4) 11
Page 806, Sec. 13 11

Colorado Revised Statutes, 1953
Chapter 137-1-3 11
Chapter 137-1-12 10
Chapter 137-5-4 . . . . . 2, 3, 5, 6, 10
Chapter 137-12-2 (4) 11

U. S. Constitution:
Art. 1, Sec. 8, 17th clause 8
Fourteenth Amendment 6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as LA SALLE MINING COMPANY, a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED L. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Colorado entered on March 28, 1960, affirming a judgment of the District Court for the County of Montrose, Colorado. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado (App. A, infra pp. 1a-3a) is reported in 350 P. 2nd 825. The judgment of the trial court, (App. B, infra pp. 7a-8a) the District Court of Montrose County, Colorado, is not reported.

JURISDICTION

The appellants are lessees of land owned by the United States located in Montrose County, Colorado. This Federally-owned land was leased to appellants by The Atomic Energy Commission for the production of uranium ores pursuant to the terms of the 1946 Atomic Energy Act. Taxes were levied against the property of the United States under the provisions of Chapter 137-5-4, Colorado Revised Statutes, 1953, and assessed to appellants. For tax purposes the value of the real property was measured by the value of the uranium ores extracted therefrom. The taxes were assessed to appellants, lessees of the land, who paid the taxes under protest. Appellants brought this action in the District Court of Montrose County, Colorado, to recover taxes so paid. Appellants also sought to have the Colorado Statute declared inapplicable under the circumstances of this case and to have the appellees, County and State officials, enjoined from exercising any rights against them under this statute. Throughout the proceedings, in the trial court and in the Colorado Supreme Court, the appellants urged and alleged that as applied to this case the Colorado Statute was repugnant to the Constitution of the United States and invalid. The Colorado Supreme Court upheld the validity of the statute and of the tax upon appellants as lessees of the United States. The Decision and judgment of the Colorado Supreme Court were entered on March 28, 1960, and the same are attached as Appendix A, infra pages 1a and 4a. Appellants filed their petition for rehearing and the same was denied April 18, 1960. (App. A, infra pp.

7a). Notice of Appeal to this Court was filed by appellants on June 16, 1960.

Jurisdiction to review the judgment of the highest court of a state by appeal is conferred on this Court by 28 U.S.C. 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal: Myles Salt Company v. Bondurant, 257 U.S. 282; United States v. City of Detroit, 355 U.S. 466; Phillips Chemical Company v. Dumas Independent School District, ... U.S. ...., 4 L. Ed. 2d 384.

STATUTE INVOLVED

Chapter 137-5-4, Colorado Revised Statutes, 1953, Volume 5, page 926:

"Assessment of producing mines. All mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purposes of taxation as provided in this section:

(1) Every person, corporation or association owning or operating any mines or mining claims which shall be a producing mine between the first and thirty-first days of January in each year, shall make out and deliver to the assessor of the county wherein such property is situate a statement showing:

(a) The name of the mine or mining claim.

(b) The name of the owner thereof.

(c) The number of acres contained in such mine or mining claims.

(d) The number of tons of ore extracted during the preceding year.

(e) The gross value of any such ore extracted, in dollars and cents.

(f) The actual cost of extracting same from mine, which shall include cost of liability and workmen's compensation insurance, but shall not include the salaries of any officers or agents not actively and consecutively engaged in or about the mine.

(g) Actual cost of transportation to place of reduction or sale.

(h) Actual cost of treatment, reduction or sale.

(i) The net proceeds, in dollars and cents, after deducting the above expenses.

Which statement shall be signed and sworn to by such person or the superintendent or managing agent of such corporation or association.

(2) The assessor, when he receives such statement, shall determine the gross proceeds of any such producing mine or mining claim for said preceding year, and at the same time shall determine the net proceeds for said preceding year, and for the purpose of assessment for taxation shall value such producing mine or mining claim at a sum equal to one-fourth of the gross proceeds for said preceding year for any such mine or mining claims. If the net proceeds of any such producing mine or mining claim for said preceding year exceeds one-fourth of the gross proceeds, then any such producing mine or mining claim shall be valued for the purpose of assessment for taxation at the amount determined by the assessor as the net proceeds for said preceding year for any such producing mine or mining claim. Any number of contiguous claims owned and operated as one property by the same person, association or corporation, the gross production of which shall be more than five thousand dollars per annum, shall be deemed and considered to be one producing mine for the purposes of this chapter.

(3) *In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and tax-*

able under this chapter on account of producing gross proceeds, then the possession shall be the subject of the assessment and if said mining property be sold for taxes levied, the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado; and the number of the survey or the name of the lode or claim, and the name of the mining district shall be sufficient description for the purposes of taxation and assessment of mining property."[1]

QUESTIONS PRESENTED

The Colorado Supreme Court construed Chapter 137-5-4, Vol. 5, page 926, Colorado Revised Statutes, 1953 as authorizing the levy of a tax against appellants, lessees of the United States of Federally-owned land. The tax was measured by the value of uranium ores produced from the Federally-owned land. The Colorado statute creates a lien upon land and provides for the sale thereof and the issuance of a treasurer's deed if the taxes remain unpaid. No Colorado statute imposes a tax on the lessee of other tax-exempt property. The questions presented are:

1. Whether this Colorado statute, as applied by the Colorado Supreme Court in this case, is repugnant to the Constitution of the United States and invalid because it taxes to appellants land which is not owned by the appellants but which is owned by the United States and on which the State may not assess taxes, Congress not having assented thereto.

2. Whether this Colorado statute, as here applied, is repugnant to the Constitution of the United States because it discriminates against the United States and those with whom it deals, and imposes an unconstitutional burden on the Federal Government and infringes upon its sovereignty.

3. Whether this Colorado statute, as here applied, is repugnant to the Constitution of the United States and in-

[1]The italicized portion is particularly pertinent to this case.

valid as violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary legislation against lessees of Federal property.

STATEMENT

The United States is, and at all times has been, the owner in fee simple of land in Montrose County, Colorado. On January 5, 1951, The United States Atomic Energy Commission pursuant to authority conferred upon it by the Act of August 1, 1946, 60 Stat. 765, leased this land to appellants for the purpose of mining uranium ores. The lease, which imposed heavy work commitments and obligations upon appellants, was for the primary term of three years subject to the right of the Government to terminate the lease upon failure of the lessee to perform any of the conditions or agreements therein contained. The lease was granted only for the purpose of mining and included the right to use the surface only as necessary for the conduct of mining operations. The lessees were required to ship all ores produced to such receiving stations as the Government might designate. The lease provides that the headframe, all tracks, rails, pipelines, bins, mine timbering and underground improvements shall become the property of the Government upon termination of the lease for any reason. The lease of January 5, 1951, which was subsequently extended and amended, is found at pages 24-28, transcript of record. Appellants, as lessees of the United States, fulfilling their leasehold obligations, produced uranium ores and delivered the same to a receiving station designated by the Government. The land of the United States was assessed to appellants under the provisions of Chapter 137-5-4, Colorado Revised Statutes, 1953, which is set forth above. At the time of trial appellants had paid $41,017.93 in taxes under protest. On January 27, 1959, subsequent to the trial court proceedings, appellants tendered an additional

$8,805.53 into court for the purpose of paying under protest, taxes levied for 1957.

Taxes levied on personal property owned by appellants and used in carrying out the leasehold obligations were paid in full, without objection or protest and taxes on personal property are not herein involved.

Appellants brought their action in the District Court of Montrose County to recover taxes so paid by them, alleging that the land was owned by the United States, that it was leased to them for the purpose of producing uranium and that the land of the United States was taxed to appellants under the terms of the above Colorado Statute. Appellants also sought an injunction prohibiting appellees from exercising any rights against them under the circumstances of this case. The District Court, denying appellants any relief, found the taxes were levied under this Colorado Statute and that appellants claimed they had been wrongfully assessed as to their taxes by Montrose County "as their mining claims were all located on Government land, and they were operating under a lease, and that such land was not subject to taxation." (App. B, infra p. 7a.) Writ of Error was taken to the Colorado Supreme Court, which affirmed the judgment of the District Court. In its opinion the Colorado Supreme Court recited that appellants contended that the finding of the trial court is the same as holding that the State of Colorado can lawfully assess and tax real estate owned by the United States. (App. A, infra, p. 2a.) The Colorado Supreme Court thus recognized appellants were asserting that the Colorado statute was repugnant to the Constitution of the United States, as applied to the circumstances of this case for the reason that appellants were assessed with a tax on real property owned by the United States. In the Opening Brief filed by appellants with the Supreme Court of Colorado the question of the constitutionality of a tax on lands of the United States was specifically raised. (Page 16, Brief attached to page

110 of the record). McCulloch v. Md., 4 Wheat 316 was cited at page 19 of the same brief. The seventeenth clause, eighth section of the First Article U. S. Constitution was cited at page 25 of the same brief. The Colorado Supreme Court rejected the constitutional objection and said "and no constitutional question is involved." (App. A, infra, p. 3a.) The Colorado Supreme Court in its opinion cited Detroit v. Murray Corp. 355 U.S. 489, U. S. v. Detroit, 355 U.S. 466, U. S. v. Muskegon 355 U.S. 484, (App. A, infra, p. 3a) apparently as authority for taxing a lessee of the United States for lands owned by the United States. The Colorado Supreme Court also cited Phillips Chemical Company v. Dumas Independent School District, ... U.S. .... 4 L. Ed. 2nd 384, as upholding the tax levied on appellants, saying (App. A, infra, p. 3a) the instant case did not fall within the Phillips case. Thus, the Colorado Supreme Court injected into this case the constitutional question of whether the United States and those with whom it deals, the appellants, were being unconstitutionally discriminated against.

THE QUESTIONS ARE SUBSTANTIAL

The important constitutional question of whether a state can validly levy taxes against real estate of the United States under a statute which creates a lien on the real estate and directs the sale thereof if the taxes are not paid, and compel a lessee of the United States to pay such tax is presented by this appeal. The Colorado statute was originally enacted in 1887 and was held valid when applied to an unpatented mining claim in Elder v. Wood, 208 U.S. 226. There, the contention was made that as to an unpatented mining claim title remained in the United States and the tax was void. This Court, recognizing that an unpatented mining claim is property, upheld the tax and the validity of a treasurer's deed which issued for non-payment of the tax. This Court has subsequently held a mining claim "is property in the fullest sense of that term." Ickes v. Vir-

ginia-Colorado Development Corp. 295 U.S. 639, at 644. The leasehold right of a lessee of the United States is not the same as the right created in the locator of a mining claim on public domain of the United States. The Colorado Supreme Court cited and relied on the Michigan cases decided in 1957.[2] However, in the Michigan cases this court emphasized that the Michigan taxes were use taxes and that the Michigan statute creating the tax affirmatively provided that the tax "shall not become a lien against the property." The vast difference between the Michigan and Colorado statutes is apparent. Colorado has no statute taxing the leasehold interest of a lessee of tax-exempt real estate, and under the decision herein appealed from, only lessees of the United States are taxed. This appeal thus presents substantial constitutional questions of basic importance and which arise in the delicate area of intergovernmental tax immunity.

I. THE STATUTE AS APPLIED IS AN UNCONSTITUTIONAL TAX ON FEDERAL PROPERTY ASSESSED AGAINST APPELLANTS

No legal principle has been more firmly established than that property owned by the Federal Government is constitutionally immune from direct taxation by a state. McCulloch v. Md. (US) 4 Wheat 316. This court has had occasion to recently approve McCulloch v. Md. and strike down a state taxing statute in conflict therewith. Phillips v. Dumas, ... U.S. ..... 4 L. Ed. 2d 384; McCulloch v. Md. was also approved in U. S. v. Detroit, 355 U.S. 466. In United States v. Allegheny County, 322 U.S. 174 a state attempted to levy a tax on the lessee of machinery owned by the United States, this Court in striking down the tax said:

---

[2]United States v. City of Detroit, 355 U.S. 466; United States v. Township of Muskegon, 355 U.S. 484; City of Detroit v. Murray Corp., 355 U.S. 489.

> "* * * the Government's property interests are not taxable either to it or to its bailee" (322 U.S. at 187)
> "* * * Government-owned property, to the full extent of the Government's interest therein is immune from taxation, either as against the Government itself or as against one who holds it as a bailee" (id at 189).

The tax held valid by the Colorado Supreme Court is likewise invalid as an unconstitutional attempt to tax Federal property against the lessee thereof. The Colorado statute does not tax the use of the property as does the Michigan statute, but taxes the land itself, and provides:

> "* * * and if said property be sold for taxes levied, the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado; and the number of the survey or the name of the lode or claim, and the name of the mining district shall be sufficient description for the purposes of taxation and assessment of mining property" Chapter 137-5-4 (3), Colorado Revised Statutes, 1953.

In its decision in the Murray Corp. case the Court pointed out "there was no effort to hold the United States or its property accountable." 355 U.S. at 493. In United States v. Detroit, 355 U.S. 466, 469, this Court also stressed the fact that any taxes due under the Michigan statutes are the personal obligation of the private lessee or user and said "The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid."

The Michigan statute upheld in United States v. Detroit specifically provides that the tax "shall not become a lien against the property."

Colorado property taxes are levied as provided by Chapter 137 of the Colorado Revised Statutes, 1953. This statute at Chapter 137-1-12 defines "real estate" as follows:

> "The term 'real estate' includes, first * * * * second,

all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto;"

In 1957 the foregoing statute was repealed and the above quoted definition was re-enacted verbatim, Colorado Session Laws, 1957, Chapter 267, page 803, Sec. 3(4), (C. 137-12-2(4), C.R.S. '53). At all times pertinent to this case and until 1957 the statute creating a lien for taxes was found at Chapter 137-1-3, C.R.S. '53, and was as follows:

"• • • Taxes levied upon real estate shall be a perpetual lien upon such real estate, until such taxes and any penalty, charges and interest which may accrue thereon shall be paid, and such liens shall have priority over all other liens. • • •"

In 1957 the foregoing statute was repealed and the following statute was enacted, Colorado Session Laws, 1957, Chapter 267, page 806, Section 13:

"Taxes levied upon real estate shall be a perpetual lien upon such real estate until such taxes and any interest, penalties and charges which may accrue thereon shall have been paid, except as otherwise provided in this chapter, and such liens shall have priority over all other liens. • • •"

The conclusion that Colorado, by the decision of its Supreme Court from which this appeal is taken, has approved the levy of a tax constituting a lien upon real estate of the Federal Government, for the non-payment of which tax the real estate of the Federal Government may be sold, is thus apparent.

The difference between the Michigan statute and the Colorado statute is apparent and fundamental. This Colorado statute, as applied by the Colorado Supreme Court to Federally-owned lands interferes with the exercise by the United States of its constitutional power as to Federal property in Colorado.

II. THE STATUTE AS CONSTRUED BY THE COLORADO SUPREME COURT DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES.

The Colorado Supreme Court cited Phillips Chemical Company v. Dumas ..... ? U.S. ..... 4 L Ed. 2nd 384, as justifying its decision. (App. A infra, p. 3a.) The result of this Colorado decision is to subject all Federally-owned lands within Colorado, leased to private parties, to taxation. No statute of Colorado taxes the leasehold interest of a lessee of tax-exempt property except, as decided in the instant case, the United States is the lessor. As this Court said in Phillips Chemical v. Dumas at 4 L Ed. 2nd 389:

> "First, it is necessary to determine how other taxpayers similarly situated are treated. Such a determination requires 'an examination of the whole tax structure of the state'."

In Phillips v. Dumas a Texas statute imposing a heavier tax burden on federal lessees than on other lessees was held to unconstitutionally discriminate against the United States and those with whom it deals. In United States v. Detroit, 355 U.S. 466 this Court at 473 said:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. McCulloch v. Maryland, 4 Wheat 316."

Colorado taxes only lessees of the United States; lessees of the State of Colorado, of charities, churches and similar entities are not taxed at all upon their leasehold interests. It is well established that a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated. Miller v. Milwaukee, 272 U.S. 713, Phillips v. Dumas, supra.

Since the Colorado statute, as interpreted by the Colorado Supreme Court, discriminates against the United States and its lessees, it is plainly unconstitutional.

CONCLUSION

For the foregoing reasons it is submitted that the questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probably jurisdiction should be noted.

Respectfully submitted,

Fred M. Wixson,
Majestic Building,
Denver, Colorado

Eugene H. Mast,
First National Bank Bldg.,
Grand Junction, Colorado

Attorneys for Appellants.

August 5, 1960

APPENDIX

APPENDIX A

Opinion of the Supreme Court of Colorado
(Caption omitted)

Mr. Chief Justice Sutton delivered the opinion of the Court.

The parties are here in the same order as they appeared in the trial court and we will refer to them herein as plaintiffs and defendants.

Plaintiffs filed their action in the trial court to recover the payment of taxes paid under protest to the County Treasurer of Montrose County, Colorado. They are lessees of producing uranium lands under a lease from the United States of America entered into under the terms of the Atomic Energy Act of 1946.

As error they urge the finding of the trial court that the statute in question properly levies a tax upon them as lessees of such real property and upon their possessory rights as lessees of the United States. The plaintiffs further contend that the finding is the same as holding that the State of Colorado can lawfully assess and tax real estate owned by the United States of America.

The pertinent parts of the statute in question (C.R.S. '53, 137-5-4) read:

> "All mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purposes of taxation as provided in this section: * * *
>
> "(3) In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable under this chapter on account of producing gross proceeds, then the possession shall be the subject of the assessment, * * *"

Plaintiffs urge as error the finding of the trial court that the statute in question properly levies a tax against lessees of real property owned by the United States of America and upon the possessory rights of lessees of the United States.

The trial court determined that there is a difference between the assessment of possessory and leasehold rights of private citizens, and an attempt to assess United States of America in its ownership of the land in question. We agree that the former is valid under our statutes and that the latter would be an invasion of the rights of the federal government. For example, in *Elder v. Wood* (1908), 208 U.S. 226, 28 S. Ct. 263, 52 L. Ed. 464, it was held that a valid subsisting mining location or an interest therein is subject to taxation by the state, though the title to the land on which such mining claim is located is in the United States, and is part of the public lands. Thus here the plaintiff's possessory rights by virtue of their leases with the United States of America are such an interest as is subject to taxation by the State of Colorado. Also see *People v. Henderson* (1888), 12 Colo. 369. 21 Pac. 144, and *Wood v. McCombe* (1906), 37 Colo. 174, 86 Pac. 319.

The difference between possession and ownership have long been recognized and need no citation of authority. The lease in question is separate property, vendible, subject to the consent of the lessor, and inheritable, hence there is no reason to hold that it is not taxable as well, unless the tax can be said to be upon the separate and distinct ownership of the federal government.

What plaintiffs really seek as private business lessees of publicly owned and tax exempt property, is to be given an economic preference over their neighboring competitors, enabling them to escape their fair share of local tax responsibility by claiming there has been no severance of the bundle of rights making up total ownership into the dominant

and lesser estates just because the former title lies in an exempt owner.

The granting of constitutional immunity from state taxation does not rest on such insubstantial formalities as the designation of a party using property of the United States of America as a "lessee." The question as to the constitutionality of a tax should be approached in the light of its practical operation, not its definition or the particular designation applied to it. *Detroit v. Murray Corp.* (1957), 355 U.S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458; *Lawrence v. State Tax Com.* (1932), 286 U.S. 276, 76 L. Ed. 1102, 52 S. Ct. 556. Also see *U. S. v. Detroit*, (1957) 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 and *U. S. v. Muskegon* (1957), 355 U.S. 484, 2 L. Ed. 2d 436, 78 S. Ct. 483.

One situation where state tax laws may run afoul of the constitution in taking the divisible interests making up the overall bundle of rights, which together constitute a fee simple ownership, is when parcels of property or rights belonging to the same class are not taxed equally as required by due process of law. See *People v. Henderson, supra* and *Phillips Chemical Company v. Dumas Independent School District* (1960) ..... U.S. ....., (Supreme Court No. 40—October Term, 1959). The instant case does not fall within this exception.

Here it is obvious that no burden is placed upon the United States Government in either a direct or indirect manner by the tax in question, and no constitutional question is involved. In addition the tax is not laid alone on a producing mine or mining claim, but also may be upon the possessory rights therein. Since it is the plaintiff's admitted possession which is the subject of an assessment made without discrimination among the class of owners it follows that the tax in dispute was properly levied and collected.

The judgment of the trial court is affirmed.

Mr. Justice Hall and Mr. Justice Frantz not participating.

Judgment of the Supreme Court of Colorado
(Caption omitted)

This cause having been brought to this court by writ of error to review the judgment of the District Court of Montrose County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that the defendants in error do have and recover of and from said plaintiffs in error their costs in this court expended, to be taxed.

(Entered Monday, March 28, 1960)

PETITION FOR REHEARING
Filed in Colorado Supreme Court
(Caption omitted)

Plaintiffs in Error would respectfully direct the attention of the Court to the following points which have been overlooked or misapprehended:

I.

THE NATURE OF THE TAX LEVIED BY C.R.S. '53 137-5-4.

This statute provides if mining property be sold for taxes levied thereunder, such sale shall pass the title. C.R.S. '53, 137-5-4 (3), cited page 12, plaintiffs' opening brief. The

validity of Treasurers' Deeds issued for non-payment of taxes levied under this statute has been upheld. *Wood v. McCombs*, 37 Colo. 74, *Eider v. Wood*, 208 U.S. 226, 53 L. Ed. 464, cited page 26, plaintiffs' opening brief. These cases dealt with the taxability of mining claims and the transfer of title by Treasurers' Deed issued for the non-payment of taxes levied under this statute. If this statute, which levies a tax resulting in the issuance of a Treasurers' Deed conveying title to a specific tract of land, be regarded as not levying a tax on land the same has been misconstrued.

II.

A MINING CLAIM IS PRIVATE PROPERTY, NOT OWNED BY THE UNITED STATES.

The location of a mining claim creates private property in the locator. Such a location has the effect of a grant by the United States. Ickes v. Virginia-Colorado Development Corp., 259 U.S. 639, 79 L. Ed. 1627, cited page 18, plaintiffs' opening brief. Mining claims, being privately owned property, are taxable. The distinction between a privately owned, taxable, mining claim and lands belonging to the United States, which it leases, has not been apprehended.

III.

TAXING OF A LESSEE OF THE UNITED STATES.

The Court has held in its opinion announced in this case on March 28, 1960, that when the United States as the owner of land in Colorado leases its land to private citizens, the possessory right of such lessee is subject to taxation because the lessee has a possessory right under the lease. The Court appears to rely upon *Detroit v. Murray Corp.* (1957) 355 U.S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458; *U. S. v. Detroit* (1957) 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 and *U. S. v. Muskegon* (1957) 355 U.S. 484, 2 L. Ed. 2d 436, 78 S. Ct. 483 as authority for such holding. These cases upheld the validity of a Michigan statute which specifically levied a

tax on such a lessee. The Michigan statute upheld by these cases is set out at page 20 of plaintiffs' opening brief. If these cases be regarded as authority for taxing the possessory right of a lessee of tax-exempt real estate in the absence of specific legislative enactment authorizing the levy of such a tax, the cases have been misconstrued and the holding of these cases extended beyond the holding of the United States Supreme Court. These cases are not authority for taxing the possessory right of a lessee of the United States on account of his possession as lessee of lands of the United States in the absence of an Act of Legislature levying such tax. Vast areas of lands owned by the United States within Colorado are used or possessed by private industry; the possessory rights of such users are not and never have been taxed. No cases are cited or known holding that the right of a lessee of the United States to be in possession of lands of the United States under a lease from the United States is taxable in the absence of legislative enactment levying such a tax.

IV.

C.R.S. '53, 142-1-4 EXEMPTS FEDERAL LANDS FROM TAXATION.

This statute, cited at page 25, plaintiffs' opening brief, provides that lands of the United States shall be and continue exempt from all state, county and municipal taxation. This statute does not appear to have been considered, although the opinion recognizes that the land is owned by the United States. The lands leased to plaintiff are not transformed into privately owned property, or into mining claims which are privately owned property by virtue of being made the subject matter of a lease from the United States. These lands, being property of the United States, are not subject to tax.

WHEREFORE, it is prayed that this Honorable Court grant a rehearing.

ORDER OF SUPREME COURT OF COLORADO DENYING PETITION FOR REHEARING

(Caption omitted)

The Court having considered the motion of plaintiffs in error for rehearing in this cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is denied.

(Entered April 18, 1960)

APPENDIX B

Judgment of The District Court, Montrose County

(Caption omitted)

The above matter came on for trial before the Court at Montrose, Colorado, on the 8th of September, 1958, the plaintiffs appearing by Eugene H. Mast and David Rosner, their attorneys, the County Treasurer, County Assessor and Board of County Commissioners appearing by George V. Kempf, County Attorney, and the State Treasurer appearing by Patricia H. Maloy, Assistant Attorney General, and Charles N. Fairlamb and J. F. Schneider as Amicus Curiae, and the Court having heard the evidence produced, and examined the exhibits, and having heard the arguments of counsel, took the matter under advisement and requested the filing of briefs and arguments, which were done and were exceeding helpful to the Court, and the Court having examined the briefs, FINDS, ADJUDGES AND DECREES as follows:

The plaintiffs claim they have been wrongfully assessed as to their taxes by Montrose County for the years of from 1951 through 1957 as their mining claims were all located on Government land, and they were operating under a lease, and that such land was not subject to taxation. The defendants take the position that the assessment was not of the land, but rather the possessory rights, and that the

amount of tax was governed by the operation of the mines located thereon and the proceeds derived therefrom.

The Court finds that the act under which the assessment was made is 137-5-4 of the 1953 Colorado Statutes Annotated, and as originally passed in 1887, provides for assessing of producing mines and possessory rights, and that act has been upheld by our own Supreme Court in the case of Wood v. McCombe, 37 Colo. 174, and affirmed in Elder v. Wood, 208 U.S. 226. Acts of similar import have been passed and upheld in the states of Michigan, California, and Montana; as appears in many of the cases cited in the briefs, possessory interests in public lands may be taxed as something separate and distinct from the title in fee, 84 C.J.S., page 383.

Many phases of the case have been ably discussed in the several briefs, but in view of the Court's decision, those matters need not be passed on.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the relief prayed for by plaintiffs be, and hereby is, denied, and defendants herein are granted their costs in this behalf expended.

Dated at Grand Junction, Colorado, this 3rd day of January, 1959.

BY THE COURT:

/s/ CHARLES E. BLAINE,
Judge.